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No. 91-

In The

Supreme Court of the United States

October Term, 1991

GERALD TEICH,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the exception to the Double Jeopardy Clause's dual sovereignty doctrine recognized in Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959), bars a subsequent federal prosecution for the same offenses for which a defendant has been convicted in state court where federal prosecutors (one of whom was simultaneously a state prosecutor) so actively participated in the prior state prosecution, from its investigatory inception, throughout pretrial proceedings, and to its conclusion by guilty plea, as to obliterate any distinction between the two sovereigns.

PARTIES TO THE PROCEEDINGS

The parties to this interlocutory proceeding are the United States and petitioner Gerald Teich ("Teich"). Teich presently faces trial in the United States District Court for the Eastern District of New York, on the criminal indictment which is the subject of this petition, along with his co-defendants Morton G. Friedberg, Igor Porotsky, Igor Roizman, and Joseph Galizia.

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OPINIONS BELOW

The United States Court of Appeals for the Second Circuit affirmed the District Court's order on October 7, 1991, in an unpublished summary order which is reproduced in the appendix (1a).[1] A petition for rehearing with a sug-

[1] Numbers within parentheses followed by a lower case "a" are page references to the appendix. Number within parentheses preceded by an upper case "A:" are page references to the appendix on appeal which Teich filed in the Second Circuit.

gestion for rehearing *in banc* was denied on December 2, 1991 (4a). The memorandum and order of the United States District Court for the Eastern District of New York (Leonard D. Wexler, J.), denying Teich's pretrial motion to dismiss the indictment on double jeopardy grounds, is also reproduced in the appendix (6a) and has been published. *United States v. Friedberg*, 766 F. Supp. 87 (E.D.N.Y. 1991).

JURISDICTION

This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254(1). *See* Supreme Court Rule 13.1 (1991). The United States Court of Appeals for the Second Circuit had jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1291. *See Abney v. United States*, 431 U.S. 651, 662 (1977); *see also Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Fifth Amendment's Double Jeopardy Clause:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

U.S. Const., Amend. V, cl. 2.

STATEMENT OF THE CASE

A. Introduction

Gerald Teich moved in the District Court to dismiss the indictment on double jeopardy grounds because he was previously prosecuted for and convicted of the same offenses, within the meaning of *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 2087 (1990), in a New York State prosecution in which federal prosecutors so actively participated, even to the extent of designating a state prosecutor to serve simultaneously as a federal prosecutor throughout the state prosecution, that this subsequent prosecution is barred by the exception to the dual sovereignty doctrine which this Court recognized in *Bartkus v. Illinois*, 359 U.S. 121 (1959).

A majority of the Circuit Courts of Appeals have recognized the *Bartkus* exception, but they have been intolerably inconsistent in applying it. Here, the Second Circuit panel which rejected Teich's double jeopardy claim implicitly rejected the *Bartkus* analysis of a prior Second Circuit panel in *United States v. Davis*, 906 F.2d 824 (2d Cir. 1990), on which Teich relied below and which requires dismissal of the indictment. The Fifth and Seventh Circuits have created an even further intolerable conflict by questioning the very existence of the *Bartkus* exception. This case respectfully warrants this Court's review to resolve this pressing question of importance to the administration of criminal justice, to bring uniformity to the interpretation of the Fifth Amendment's Double Jeopardy Clause throughout the Nation, and to vindicate Teich's Fifth Amendment rights by correcting the Second Circuit's er-

roneous interpretation of the *Bartkus* exception in this case. This case is a peculiarly appropriate one in which to resolve the issue because the facts have been largely deemed conceded by the courts below. *See Friedberg*, 766 F. Supp. at 90 ("Thus, even assuming, *arguendo*, the veracity of defendants' assertions, no basis exists for disregarding the dual sovereignty doctrine.")

B. Indictment CR-91-0072

On January 30, 1991, a Grand Jury sitting in the United States District Court for the Eastern District of New York returned a 5-count indictment (Indictment CR-91-0072) alleging that Teich, his co-defendants, and certain unindicted co-conspirators (including Sheldon Levine ("Levine")), conspired between January 1, 1984 and March 8, 1986, to defraud the Internal Revenue Service and to evade the payment of federal excise taxes on numerous gasoline sales transactions (A:16-26). The indictment also alleges four substantive tax evasion counts (A:27-31).

C. Teich's Prior New York State Prosecution

The allegations in the present indictment are based upon information obtained by a joint investigative task force ("Task Force"), begun in 1982, by New York State and the Federal government into alleged excise tax violations in the Long Island wholesale gasoline industry. The principal and critical evidence underlying the government's case derives directly from New York State court-authorized eavesdropping at Levine's Melville, New York business premises in the Fall of 1985, as a result of which the Task Force has obtained prior

state and federal indictments against many defendants, including Levine. Levine became a chief target of the Task Force's investigation only after he was interviewed by the federal prosecutors who were part of and the driving force behind the Task Force.

On July 16, 1986, a Grand Jury sitting in the County Court of Suffolk County handed up a 185-count indictment charging Levine, Teich, and others, with various New York State crimes, relating to the failure to pay New York State excise taxes on gasoline sales transactions, including a conspiracy to commit those crimes. On October 16, 1986, the same Suffolk County Grand Jury handed up a 1004-count superseding indictment expanding on the charges in the original indictment (A:32-55). Contemporaneously, a Grand Jury in the United States District Court for the Eastern District of New York returned an indictment, 86 CR 304 (EHN), against Levine and others, although not Teich, alleging federal crimes relating to the failure to pay federal excise taxes on the same gasoline sales transactions. *See United States v. Levine,* 690 F. Supp. 1165 (E.D.N.Y. 1988).

On May 11, 1987, Teich pleaded guilty in Suffolk County Court to 1003 counts of the superseding indictment, including count 1004, which alleges an extensive conspiracy clearly encompassing the same underlying gasoline sales transactions which underlie the federal indictment in this case, as part of a plea agreement.

D. Federal Prosecutors' Active Participation in Teich's Prior New York State Prosecution

Teich's double jeopardy claim rests upon the admitted, extensive, and active participation of federal prosecutors in the Task Force and in Teich's prior state prosecution. The government necessarily conceded below, and the District Court found, that the Task Force was composed of investigators and prosecutors from the offices of the following federal and state officials and agencies:

> the New York State Attorney General, the Nassau and Suffolk County District Attorneys, the New York State Department of Taxation and Finance, the Nassau and Suffolk County Police Departments, the United States Attorney for the Eastern District of New York, the Organized Crime Strike Force for that district, the Federal Bureau of Investigation, and the Internal Revenue Service.

Friedberg, 766 F. Supp. at 88; *see Levine*, 690 F. Supp. at 1168. The active participation of federal prosecutors, who were the ultimate source of power driving Teich's state prosecution, distinguishes this case from those in which the mere involvement of federal investigative agents was held not to bar a subsequent federal prosecution after a prior state prosecution. Here, the federal prosecutors' actions in the state prosecution were so inextricably intertwined with those of the state prosecutors (from the case's inception through the plea agreement and guilty plea) that those actions fatally undermine the assumption that Teich's prior state prosecution and this one are independent criminal actions being prosecuted by

separate sovereigns. Although the government has never challenged Teich's factual assertions regarding the active participation of federal prosecutors in his prior state prosecution, certain facts bear special emphasis in light of the showing required by *Bartkus* and its progeny.

1. Levine's Strike Force Debriefing

The critical phase in the Task Force's investigation occurred between January and June 1984, when federal Task Force investigators repeatedly interviewed Levine after he had allegedly been beaten by another alleged gasoline "bootlegger," John Musacchia, who was then a target of a federal grand jury probe and who was subsequently prosecuted. *Levine*, 690 F. Supp. at 1180; *see United States v. Musacchia*, 696 F. Supp. 1548 (E.D.N.Y. 1988), *aff'd*, 800 F.2d 493 (2d Cir. 1990). Ultimately, on June 1, 1984, a federal prosecutor, Laura A. Brevetti, Esq., who was then the Assistant Attorney-in-Charge of the Organized Crime Strike Force for the Eastern District of New York ("Strike Force"), informed Levine that he was not a target of a federal grand jury investigation. Brevetti offered Levine the opportunity to cooperate in a pending federal grand jury proceeding, and promised Levine that the fact that he had been "present in government offices would not be made known to persons other than Strike Force personnel involved in the investigation." *Levine*, 690 F. Supp. at 1180. Although he had made damaging admissions to the Strike Force, Levine declined to cooperate. *Id.*

While the Task Force had not previously viewed Levine as a target of its investigation, his inculpatory statements to the Strike Force were used as the critical evidence

in support of the Task Force's later application to New York State Judge Kenneth Rohl for the state eavesdropping warrants which authorized the electronic surveillance of Levine's business premises. Only after the Task Force obtained the Levine eavesdropping evidence, did the Suffolk County Grand Jury return indictments against Levine, Teich, and the others. During the covert eavesdropping, federal prosecutors continued actively to participate in the Task Force investigation which led to Teich's state indictment, as evidenced by the Strike Force's application to Judge Rohl for authority to present the evidence obtained from the Levine electronic surveillance to a federal grand jury, pursuant to *United States v. Marion*, 535 F.2d 697, 707 (2d Cir. 1976). As Judge Nickerson found in *Levine*, the New York Attorney General and the Strike Force "knew, of course, from the outset that they would hear communications about federal tax crimes." 690 F. Supp. at 1172. The undisputed evidence thus shows that federal prosecutors actively participated in Teich's state prosecution and that they indeed were the dynamic and ultimate source of power behind the Task Force investigation which led to Teich's state court prosecution and conviction. If federal prosecutors had not elicited Levine's admissions, probable cause for the state court authorized eavesdropping warrants would not have existed, the critical eavesdropping evidence would not have been obtained, and there would have been no prior state prosecution of Teich.

2. Jermyn's Simultaneous State And Federal Authority

Equally powerful evidence supporting Teich's double jeopardy claim concerns the simultaneous dual status as a state and federal prosecutor of Raymond A. Jermyn, Esq.,

throughout the time frame of Teich's state prosecution. Jermyn's simultaneous dual status underscores Teich's claim that federal prosecutors were so inextricably intertwined in his state prosecution that this second federal prosecution for the same offenses is barred by the *Bartkus* exception. There is no dispute that, throughout the investigation and prosecution of Teich's state case, Jermyn simultaneously served as a Suffolk County Assistant District Attorney, as a New York State Assistant Attorney General, and as a Special Assistant United States Attorney for the Eastern District of New York. In response to Teich's motion in the District Court, Jermyn stated: "From August 25, 1983 to March 31, 1989, I was cross-designated as a Special Assistant United States Attorney. My designation as an attorney authorized to represent the United States of America terminated on March 31, 1989." (A:119-120).

There is also no dispute that Jermyn, already a federal prosecutor, along with New York State Assistant Attorney General Vincent O'Reilly, was one of the two supervising attorneys for the Levine electronic surveillance operation. *Levine,* 690 F. Supp. at 1175. There is no dispute that Jermyn actively participated in obtaining state extension orders for the surveillance from Judge Rohl. *Levine,* 690 F. Supp. at 1175-76. There is no doubt that Jermyn represented the United States as a Special Assistant United States Attorney in the *Levine* prosecution. *Levine*, 690 F. Supp. at 1167-68 (acknowledging Jermyn's appearance as counsel). There is no doubt that Jermyn simultaneously represented New York and actively participated in Teich's state prosecution, including assisting in preparing the memorandum of law submitted in opposition to the state defendants' motion to suppress

evidence derived from the Levine eavesdropping which Jermyn had supervised (A:108). Indeed, that memorandum reveals that New York expressly and rightly regarded the simultaneously-ongoing federal *Levine* case as a "companion" case to Teich's state case since Jermyn was simultaneously prosecuting both and both were predicated upon the same Levine eavesdropping evidence (A:112). Furthermore, that memorandum explicitly reveals that the very same federal and state prosecutors jointly crafted the federal and state responses to the defendants' respective federal and state court motions to suppress the Levine eavesdropping evidence (A:112) ("To the extent that the issues are the same in Levine's federal court and state court challenge to [the eavesdropping evidence], the People's response, where appropriate, will be the same herein as the Government's response in the federal court.") Further evidencing the inextricable intertwining of federal prosecutors in the state prosecutions, Jermyn's federal supervisor, Ms. Brevetti, the prosecutor in charge of the federal Strike Force, participated in the state plea negotiations. Indeed, the federal government's active participation in Teich's state prosecution was so pervasive that presiding State Court Judge Rohl fairly and explicitly concluded that the federal and state governments became "one government" in the case.

3. The Kryssing Plea Agreement

In further support of his motion below, Teich pointed to a telling admission by the government in a plea agreement in which the Task Force itself defined "the government" to include both the State of New York and the United States. After Teich's state court guilty plea, Jermyn continued to

serve concurrently as both a state and federal prosecutor. On August 9, 1989, Jermyn subscribed to a plea agreement which George Kryssing entered with the government. Kryssing was implicated by Levine as one of his gasoline suppliers (A:81-85). Kryssing's plea agreement dramatizes the Janus-like irony of the government's claim that the dual sovereignty doctrine permits it to exact further punishment from Teich despite its inextricable privity with Teich's prior state prosecution and conviction. The Kryssing plea agreement emphatically crystallizes the gravamen of Teich's double jeopardy plea because there, in its own words, the government, through the many-titled Jermyn, specifically defined "the government," at least for the Task Force's purposes, to include:

> the United States Department of Justice, Fraud Section, the Organized Crime Strike Force for the Eastern District of New York, the State of New York, and Suffolk County ("the government") [.]

(A:82). Jermyn subscribed to the Kryssing's plea agreement, on behalf of "the government," and "for" the Strike Force's Acting Attorney-in-Charge, simultaneously as a Special Assistant United States Attorney, as an Assistant District Attorney for Suffolk County, and as a Special Assistant Attorney General of the State of New York. Thus, even the government has admitted that the Task Force which prosecuted Teich's state case was but *one, singular* "government."

E. The District Court's Decision

Teich moved to dismiss the indictment on double jeopardy grounds, relying upon the *Bartkus* exception as ex-

plained in *United States v. Davis*, 906 F.2d 829 (2d Cir. 1990), and in *United States v. Belcher*, 762 F. Supp. 666, *adhered to on denial of motion to amend*, 769 F. Supp. 201 (W.D.Va. 1991). In denying Teich's motion, without an evidentiary hearing, the District Court recognized the existence of the *Bartkus* exception to the dual sovereignty doctrine, and the distinction *Davis* draws between mere federal investigators and federal prosecutors, but held that Teich had failed to prove sufficient "manipulation" of the state prosecution by federal prosecutors to come within the *Bartkus* exception (11a-12a). *Friedberg*, 766 F. Supp. at 89-90. The District Court stayed further proceedings pending an appeal as of right to the Second Circuit, pursuant to 28 U.S.C. § 1291, under the doctrine of *Abney v. United States*, 431 U.S. 651, 662 (1977). *See Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).

F. The Second Circuit's Summary Order

The Second Circuit affirmed the District Court's order in a summary order which rejected Teich's claims in conclusory fashion. Although the Court cited *Davis* in its summary order it did not fairly respond to Teich's arguments which were premised upon *Davis'* analysis of the *Bartkus* exception (*see* 2a). The Second Circuit denied a petition for rehearing with a suggestion for a rehearing *in banc* on December 2, 1991 (4a).

REASONS FOR GRANTING THE WRIT

A. Supreme Court Rule 10.1 Considerations

This case presents the question whether the exception to the Double Jeopardy Clause's dual sovereignty doctrine which this Court recognized in *Bartkus v. Illinois*, 359 U.S. 121 (1959), bars Teich's federal prosecution for the same offenses for which he was previously prosecuted in state court where federal prosecutors so inextricably intertwined themselves with Teich's state prosecution that they obliterated any distinction between the federal and state governments. This case thus merits this Court's review foremost because the Second Circuit's decision is inconsistent with *Bartkus* and has deprived Teich of his Fifth Amendment rights. This Court should correct that error.

Moreover, guided as we must be by the considerations reflected in this Court's Rule 10.1(a), this case also merits this Court's discretionary review because of the unacceptably inconsistent treatment the *Bartkus* exception has been given by the Circuit Courts of Appeals. While the majority recognize the exception, under inconsistent standards of applicability, the Fifth and Seventh Circuits have expressly questioned even the existence of the exception. This Court should intervene to resolve this intolerable inconsistency concerning the interpretation of so fundamental a constitutional right as is guaranteed by the Double Jeopardy Clause.

In moving to dismiss the indictment in this case under the *Bartkus* exception, Teich relied upon *United States v.*

Davis, 906 F.2d 824 (2d Cir. 1990), in which the Second Circuit had carefully analyzed the *Bartkus* exception in terms of the dual sovereignty doctrine's justifying rationale and focused, as this Court did in *Bartkus*, upon the extent to which federal prosecutors actively participated in the prior state prosecution as the central criterion in applying the *Bartkus* exception. Under the analysis in *Davis*, the *Bartkus* exception clearly bars Teich's present federal prosecution. In rejecting Teich's double jeopardy claim, therefore, the Second Circuit panel has not only created an intolerable intra-Circuit conflict with *Davis*, but it has erroneously failed to adhere to this Court's decision in *Bartkus* with whose analysis *Davis* was fastidiously faithful.

This internal Second Circuit conflict mirrors a broader, and equally intolerable, conflict among the Circuit Courts of Appeals both as to whether the *Bartkus* exception exists and, if it does, under what circumstances it applies. The Second, Third, Eighth, Ninth, and D.C. Circuits have all acknowledged the existence of the *Bartkus* exception to the dual sovereignty doctrine, although they have varied in their approaches, even within their Circuits, as to when it applies. *Compare United States v. Coonan*, 938 F.2d 1553, 1562-63 (2d Cir. 1991), *with Davis*, 906 F.2d at 834-35; *United States v. Pungitore*, 910 F.2d 1084, 1105-06 & n.20 (3d Cir. 1991); *United States v. Moore*, 822 F.2d 35, 38 (8th Cir. 1987); *compare also United States v. Figueroa-Soto*, 938 F.2d 1015, 1018-20 (9th Cir. 1991), *with United States v. Guy*, 903 F.2d 1240, 1242 (9th Cir. 1990) *(per curiam)*, *and United States v. Bernhardt*, 831 F.2d 181, 182-83 (9th Cir. 1987); *United States v. Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976). The Fifth Circuit and recently the Seventh Circuit have questioned whether any *Bartkus* ex-

ception exists at all. *United States v. Patterson*, 809 F.2d 244, 247 n.2 (5th Cir. 1987); *compare United States v. Paiz*, 905 F.2d 1014, 1024 & n.13 (7th Cir. 1990), *with United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). The Tenth Circuit has also recently characterized the *Bartkus* exception as only a "possible" exception to the dual sovereignty doctrine. *United States v. Raymer*, 941 F.2d 1031, 1037-38 (10th Cir. 1991). Given the importance of the right in issue and the increasing frequency with which the issue arises due to cooperative prosecutorial efforts between the states and the federal government, it is intolerable that so basic an issue as whether the *Bartkus* exception even exists should engender so much litigation more than thirty years after *Bartkus* was decided.

Aside from the importance of this case to resolve plainly that *Bartkus* did establish an exception, albeit a narrow one, which limits the dual sovereignty doctrine, this case merits review to correct the Second Circuit's erroneous failure to apply the *Bartkus* exception.

B. The Merits of the Bartkus Issue

The Fifth Amendment's Double Jeopardy Clause prohibits the government from using its assembled arsenal of prosecutorial resources to subject any person "for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const., Amend. V, cl. 2. Justice Black's frequently quoted statement in *Green v. United States*, 355 U.S. 184 (1957), remains the standard exposition on the purposes underlying this safeguard of Anglo-American liberty:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

355 U.S. at 187-88. The Double Jeopardy Clause prohibits a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). Teich's federal prosecution violates the latter two prohibitions and the active participation of federal prosecutors in Teich's prior state prosecution for the same offense bars the government from relying upon the dual sovereignty doctrine.

The dual sovereignty doctrine is an enduring exception to the Double Jeopardy Clause which generally permits the federal government and each of the several states to independently prosecute an offense against their sovereignty without regard to whether the defendant was previously prosecuted for the same offense. *Heath v. Alabama,* 474 U.S. 82, 88-89 (1985); *United States v. Wheeler,* 435 U.S. 313, 320 (1978); *Abbate v. United States,* 359 U.S. 187, 193-94 (1958); *Bartkus v. Illinois,* 359 U.S. 121, 123-24 (1959); *United States v. Lanza,* 260 U.S. 377, 382 (1922); *Moore v. Illinois,* 55 U.S. (14 How.) 13, 19-20 (1852).

This Court has justified the dual sovereignty doctrine as essential to protect the unique nature of our federalism which simultaneously recognizes both the federal government's sovereignty and the complementary sovereignty of the states under the Constitution. *Heath*, 474 U.S. at 88-89, 92-93; *Wheeler*, 435 U.S. at 320; *Abbate*, 359 U.S. at 195; *Bartkus*, 359 U.S. at 131-33, *Davis*, 906 F.2d at 832. The doctrine has been limited, however, to those instances where the doctrine's factual application is consistent with its justifying principle.[2] Here, of course, if there had been no federal involvement in Teich's state prosecution, the traditional learning makes clear that the dual sovereignty doctrine would permit a subsequent federal prosecution for the same offense, subject only to the discretion of federal prosecutors. *Abbate*, 359 U.S. at 193-94; *Bartkus*, 359 U.S. at 123-24; *Lanza*, 260 U.S. at 382.[3] By the same token, however, this Court recognized in *Bartkus* that the dual sovereignty doctrine will not apply where the two sovereigns so align their interests in the initial prosecution that the dual sovereignty doctrine would become no more

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2 *See Waller v. Florida*, 397 U.S. 387, 389 (1970) (rejecting claims of separate sovereignty of state political subdivisions); *cf. Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) (federal government barred from using testimony given under state immunity grant); *Elkins v. United States*, 364 U.S. 206 (1960) (federal government barred from using evidence obtained by state officials in violation of state law).

3 The Second Circuit has held that the government's "*Petite*" policy, *see* 9 U.S. Department of Justice, *United States Attorneys' Manual* § 2.142; *Petite v. United States*, 361 U.S. 529, 531 (1960) (*per curiam*), is not judicially enforceable. *See United States v. Catino*, 735 F.2d 718, 725 (2d Cir.), *cert. denied*, 469 U.S. 855 (1984).

than a subterfuge to circumvent the rights guaranteed by the Double Jeopardy Clause. *Bartkus*, 359 U.S. at 123-24; *see Davis*, 906 F.2d at 832.

In *Bartkus*, an Illinois state court jury convicted Alphonse Bartkus of robbery under an Illinois statute. A month before, a federal court jury had acquitted him (but convicted his co-defendants) of the same bank robbery under the federal bank robbery statute. This Court explicitly found that the "state and federal prosecutions were separately conducted." 359 U.S. at 122-23.[4] In upholding Bartkus' conviction under the dual sovereignty doctrine, this Court implicitly, but nevertheless clearly, indicated that successive prosecutions would have been barred if one sovereign had been acting as a "tool" of the other, 359 U.S. at 123, or if one prosecution had been merely "a sham and a cover" for another, 359 U.S. at 124. As noted above, the majority of the Courts of Appeals have read these metaphors as the *Bartkus* exception to the dual sovereignty doctrine.

As the Second Circuit has observed, the *Bartkus* exception recognizes:

> that circumstances may exist in which state and

---

[4] This Court did note that an FBI agent had provided the state prosecutor with the evidence the agent had gathered and that there was a slight delay in the convicted co-defendants' federal sentencing so that in the interim they could testify against Bartkus at his state trial. 359 U.S. at 122-23. In patent distinction with Jermyn's uncontestable personal engagement in Teich's prior state prosecution, there was no evidence in *Bartkus* that federal prosecutors actively participated in Bartkus' successive state prosecution. *Id.*

> federal prosecutions are so intertwined as to undermine the assumption that two supposedly independent criminal actions were prosecuted by separate sovereigns.

Coonan, 938 F.2d at 1563 (citations omitted). In *Davis*, although the Court found no need to "refine the somewhat ambiguous contours" of the *Bartkus* exception, 906 F.2d at 835, the Second Circuit nevertheless carefully outlined the minimum showing required to satisfy the *Bartkus* exception:

> Some courts have indicated that a defendant must demonstrate that the state proceeding was merely "a sham and a cover for a federal prosecution," meeting the dual sovereignty exception of *Bartkus* .... Others, however, have required only active participation by the federal government in the first proceeding a finding that the United States had a "laboring oar" in the state court litigation sufficient to activate principles of estoppel...

906 F.2d at 834-35 (citations omitted); *see Montana v. United States*, 440 U.S. 147, 153-55 (1979) (applying "laboring oar" analysis in civil context).

Davis involved a joint task force investigation by state police and federal DEA investigators. The task force had seized narcotics, but a state court suppressed the evidence as illegally obtained. Two months later, when a federal indictment charged the defendants with the same drug-related conduct, the District Court gave the state ruling collateral estoppel effect and also suppressed the evidence. The Second

Circuit squarely addressed the *Bartkus* issue,[5] but reversed, holding that the federal cooperation involved was not close enough to come with the *Bartkus* rule. Drawing upon the applicable principles of collateral estoppel,[6] the Second Circuit distinguished between the mere involvement of federal investigative agents in a cooperative state-federal investigation and the active participation of federal prosecutors in the state prosecution: "the focus of [the *Bartkus*] inquiry must be on *those with the authority to act in their sovereign's name, the prosecutors,* and not the law enforcement officers assigned to

---

[5] *See Davis,* 906 F.2d at 831 ("The question before us today is under what circumstances such [federal-state] cooperation becomes so close that the federal government should be bound by a determination in state court.")

[6] In *Ashe v. Swenson,* 397 U.S. 436 (1970), this Court held that the protections of the Double Jeopardy Clause include collateral estoppel principles which may preclude subsequent litigation of an issue decided in a criminal defendant's favor. 397 U.S. at 445. Although Teich's state prosecution ended in conviction, that was a "favorable" result to the extent that the Double Jeopardy Clause now prohibits him from being prosecuted or punished again for the same offense. *Pearce,* 395 U.S. at 717.

Collateral estoppel principles are peculiarly appropriate to the *Bartkus* exception to the dual sovereignty doctrine because the exception's very purpose is to bind a second sovereign by the result of a prior criminal action, brought in the name of another sovereign, where, as here, the second sovereign had at least a "laboring oar" in the prior criminal action. *Davis,* 906 F.2d at 833 (non-party to action may be bound by issues decided "if it 'controls or substantially participates in the control of the presentation on behalf of a party,'" quoting *Restatement (Second) of Judgments* § 39 (1982) (other citation omitted)).

the task force." *Davis*, 906 F.2d at 834 (emphasis added).[7] The Court explained:

> At a minimum, it must be shown that federal prosecutors actively aided the state prosecutors [in the state proceedings]. Only then can it be said that their interests in enforcing federal law were sufficiently represented.

Davis, 906 F.2d at 834. Proof of such active participation in a state prosecution by sovereign power-wielding, federal prosecutors will "abrogat[e] the doctrine of dual sovereignty." *Id.*[8]

---

[7] *Davis* thus acknowledged prior Second Circuit holdings that mere allegations that successive state and federal prosecutions are the product of federal investigative agents' having participated in a joint state-federal investigation of criminal activity were insufficient to come within the *Bartkus* rule. Since such agents "do not file charges or otherwise control prosecutions, their status as federal agents is not determinative of the privity issue." 906 F.2d at 834; *see United States v. Aboumoussallem*, 726 F.2d 906, 910 (2d Cir. 1984); *United States v. Russotti*, 717 F.2d 30 (2d Cir. 1983), *cert. denied*, 465 U.S. 1252 (1984).

[8] The *Coonan* panel expressed the same notion in indicating that the "key criterion" in determining the application of the *Bartkus* exception is to assess the "ultimate source of power under which respective prosecutions were undertaken." 938 F.2d at 1563, quoting *Wheeler*, 435 U.S. at 320 (other citations omitted). Here, mere federal investigators were not behind Teich's prosecution, federal prosecutor's with the unique and ultimate power to bind the United States, were the "ultimate source of power" under which both the state and this present prosecution were undertaken. The focus of *Davis*' analysis on the extent of federal prosecutorial participation in the prior state prosecution is critical to a proper reading of the *Bartkus* exception. If "ultimate source of power" were to mean only whether successive prosecutions were brought in the names of different sovereigns, the dual sovereignty doctrine

The plainly distinguishable facts in *Davis* provide a telling contrast to the circumstances of Teich's prosecution:

> The record here is totally barren of evidence of such [federal] control or participation. No federal prosecutors were present in [the state judge's] courtroom during the suppression hearing. *Nothing indicates that they provided assistance or advice to the local authorities at anytime, or were involved in any way with the local prosecution or the decision not to appeal the suppression order.*

906 F.2d at 835 (emphasis added); *see also Coonan*, 938 F.2d 1563. ("[N]o basis exists to conclude . . . that the state prosecutors were not acting independently when they indicted and prosecuted [the defendant]"). Here, far from being "totally barren" of any evidence of federal prosecutors' involvement and assistance in Teich's state prosecution, the record is replete with such undisputed evidence. The government's own admissions prove that federal prosecutors, from the very outset of the Task Force investigation, by specific design, played a signal role in the Task Force investigation which resulted in Teich's state prosecution. Indeed, federal prosecutors continued their active involvement during the actual course of Teich's state prosecution after he was indicted.

(footnote 8 cont.)

would entail no more than a reading of the case captions. Such a reading of the dual sovereignty doctrine, however, would render this Court's discussion of the "tool" and "sham and cover" metaphors in *Bartkus* a misguided irrelevancy and would negate the existence of *Bartkus'* exception. Such a strained reading carries its own refutation.

Thus, the government has never challenged Teich's allegations regarding the pervasive role of federal prosecutors as a driving force of the Task Force. Nor has the government challenged the extent of Jermyn's active participation, simultaneously as a state and federal prosecutor, in Teich's state prosecution. In direct contrast with *Davis*, federal prosecutors actively participated in and assisted in the suppression stage of the state court proceedings and in plea negotiations. Indeed, the state's memorandum of law regarding the suppression motion not only evidences Jermyn's actual participation, it concedes that the state and federal prosecutors crafted and shared the same arguments which were made in the state and federal courts to safeguard the admissibility of the Levine eavesdropping evidence. Furthermore, the Kryssing plea agreement contains the government's admission that the Task Force constituted essentially one government by specifically defining the "government" to be an admixture of the federal prosecutors and New York State.

Indeed, with respect to Jermyn, the federal and state sovereigns merged by granting one man the power to act on the behalf of each sovereign. Under remarkably similar circumstances, in *United States v. Belcher,* 762 F. Supp. 666, *adhered to on denial of motion to amend*, 769 F. Supp. 201 (W.D.Va. 1991), the District Court found that such an agglomeration of sovereign power in a single prosecutor created, in effect, a "super sovereign," the simple realities of which were inconsistent with the dual sovereignty doctrine:

> . . . if the same prosecutor simultaneously derives power from both a State and the federal government, then the whole underpinning of

> federalism is destroyed. The fact that the two sovereigns have essentially pooled their powers in one prosecutor strongly suggests to the court that in reality there are no longer two sovereigns at work. Instead, the pooling of prosecutorial power effectively creates one "super sovereign," *i.e.*, a unitary government.

762 F. Supp. at 671. In *Belcher*, a Virginia state prosecutor, who dismissed a state prosecution against Belcher after a suppression motion was granted, secured a commission as a Special Assistant United States Attorney and obtained a federal indictment against Belcher for a federal crime predicated upon the same conduct which had been the subject of the aborted, prior state prosecution. The District Court held that the *Bartkus* exception to the dual sovereignty doctrine required dismissal of the federal indictment. *Id.*

Teich expressly relied upon *Belcher* below and urged that dismissal of the indictment in this case was required, a *fortiori*, because Jermyn prosecuted Teich while he was simultaneously a federal and state prosecutor. In *Belcher*, the prosecutor did not receive his federal authority until after the state prosecution had been terminated. Although in rejecting Teich's double jeopardy claim, both the District Court and the Second Circuit acknowledged Teich's argument regarding Jermyn's dual status, neither court mentioned *Belcher* nor attempted to square the result in Teich's case with the result in *Belcher*. Although *Belcher* was obviously not binding precedent in the Second Circuit, it reflects a conflicting approach to the application of *Bartkus* which this Court should not allow to go unresolved because of the obvious need to have the Double Jeopardy Clause interpreted uniformly across the

Nation, particularly given the frequency with which state prosecutors are cross-designated as federal prosecutors. In *Bernhardt*, in ordering a hearing on the issue, the Ninth Circuit recognized that such a cross-designation might implicate the *Bartkus* exception in the absence of independence of federal involvement. 831 F.2d at 183. The Tenth Circuit, in marked contrast, has flatly rejected challenges under the *Bartkus* exception to cross-designated prosecutors. *Raymer*, 941 F.2d at 1038; *United States v. Padilla*, 589 F.2d 481, 484 (10th Cir. 1978). These radically conflicting approaches to the *Bartkus* exception counsel this Court's intervention to ensure uniformity among the Circuits.

Although the Second Circuit did not expressly address the issue in its summary order, the District Court held that Teich had failed to prove sufficient "manipulation" by federal prosecutors of Teich's state prosecution to bring this case within the *Bartkus* exception. *Friedberg*, 766 F. Supp. at 89-90. Outside the realm of true venality, however, it is difficult to conceive how a state prosecution could be "manipulated" any more than by having a federal prosecutor conduct it. The District Court's "manipulation" standard is inconsistent with *Bartkus* and *Davis* because it would require a showing that bad faith, rather than merely poor judgment, was the underlying motivation for the second prosecution. As *Davis* points out, the *Bartkus* exception requires only a showing of "active participation" by federal prosecutors in the prior prosecution to abrogate the dual sovereignty doctrine. 906 F.2d at 834, 835. Moreover, by failing to order the discovery Teich sought regarding the government's motive, or to order an evidentiary hearing, the District Court established an impossible standard for Teich to meet and denied him the

rudimentary trappings of due process to obtain and present such evidence.

In sum, given Jermyn's and the other federal prosecutors' active roles in Teich's state prosecution, the government has virtually conceded the very factual circumstances which bring this case within the *Bartkus* exception and establish that the federal government used the prior state prosecution as a "tool" in its prosecution of Teich and that this second prosecution is merely a "sham and a cover" to exact greater punishment from Teich than was meted out in the state prosecution.

CONCLUSION

For the foregoing reasons, we respectfully request that this petition for a writ of certiorari be granted.

Dated: New York, New York
December 12, 1991

Respectfully submitted,

WALLACE MUSOFF
MICHAEL J. COYLE
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ORENSTEIN, P.C.
Attorneys for Petitioner
Gerald Teich

No. 91 -

In The

Supreme Court of the United States

October Term, 1991

GERALD TEICH,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

APPENDIX A - SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 7, 1991 [pages 1a - 3a]

EDNY
91-cr-72
Wexler

(TJM)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the seventh day of October, one thousand nine hundred and ninety-one.

Present:

HONORABLE THOMAS J. MESKILL,

HONORABLE LAWRENCE W. PIERCE,

HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH GALIZIA and GERALD TEICH,

Defendants-Appellants,

MORTON G. FRIEDBERG, also known as Jerry Friedberg, IGOR POROTSKY, IGOR ROIZMAN, GERALD TEICH,

Defendants.

Docket Nos.
91-1418
91-1423

This is an expedited appeal from an order of the

APPENDIX A
[Summary Order of The Court of Appeals]

United States District Court for the Eastern District of New York, Wexler, J., denying appellants' pretrial motion to dismiss on double jeopardy grounds the indictment for failure to pay federal excise taxes on gasoline sales transactions because of appellants' prior convictions for failure to pay state excise taxes on the same gasoline sales transactions.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED.

Appellants contend that the federal prosecution violates the Double Jeopardy Clause of the Fifth Amendment because they previously pleaded guilty in a state proceeding arising from a joint federal and state investigation. Under the principle of dual sovereignty, the Double Jeopardy Clause does not preclude successive state and federal prosecutions for the same acts. *Abbate v. United States*, 359 U.S. 187 (1958); *United States v. Davis*, 906 F.2d 829, 832 (2d Cir. 1990). The governments' actions with respect to the two prosecutions do not fall within the narrow *Bartkus* exception to the dual sovereignty doctrine. *Bartkus v. Illinois*, 359 U.S. 121 (1959). Neither prosecuting sovereign was "acting as a `tool' of the other" nor was one prosecution "merely a `sham and a cover" for the other. *Davis*, 906 F.2d at 832 (quoting *Bartkus*, 359 U.S. at 123-24). Despite state prosecutor Jermyn's cross-designation as a Special Assistant United States Attorney, the state and federal prosecutions were not "so intertwined as to undermine the assumption that two supposedly independent criminal actions were *prosecuted* by separate sovereigns." *United States v. Coonan*, slip op. 5355,

APPENDIX A
[Summary Order of The Court of Appeals]

6374-76 (2d Cir. July 16, 1991).

s/_____
Thomas J. Meskill, U. S. C. J.

s/_____
Lawrence W. Pierce, U. S. C. J.

s/_____
J. Daniel Mahoney, U. S. C. J.

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 2, 1991 [pages 4a - 5a]

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of December one thousand nine hundred and ninety-one.

UNITED STATES OF AMERICA,

Appellee,

-v-

DOCKET NUMBER 91-1418

MORTON G. FRIEDBERG, also known as Jerry Friedberg, IGOR POROTSKY, IGOR ROIZMAN, GERALD TEICH,

Defendants,

JOSEPH GALIZIA AND GERALD TEICH,

Defendants-Appellants.

A petition for rehearing containing a suggestion that

the action be reheard in banc having been filed herein by Appellant Joseph Galizia.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/
Elaine B. Goldsmith
Clerk

APPENDIX C - MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DATED JUNE 24, 1991 [pages 6a - 14a]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

MEMORANDUM
AND ORDER
CR 91-0072

Plaintiff,

(Wexler, J.)

-against-

MORTON G. FRIEDBERG, a/k/a "Jerry Friedberg," IGOR POROTSKY, IGOR ROIZMAN, JOSEPH GALIZIA, and GERALD TEICH,

Defendants.

----------x

APPEARANCES:

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WEXLER, District Judge

In the above -referenced action, a federal indictment charged defendants with numerous violations, including federal tax evasion, stemming from a gasoline bootlegging operation uncovered pursuant to a joint state-federal task force investigation. Defendants previously had pleaded guilty to an extensive state indictment culled from the same investigation, and they now seek to dismiss the federal indictment on

double jeopardy grounds. Presently before the Court is defendants' motion for dismissal pursuant to Rule 12(b) (1) of the Federal Rules of Criminal Procedure and the Double Jeopardy Clause of the Fifth Amendment. For the following reasons, defendants' motion is denied.

BACKGROUND

Defendants were investigated as part of a joint state-federal task force operation designed to pursue allegations of state and federal excise tax evasion in the metropolitan New York area. Participating in the investigation were the New York State Attorney General, the Nassau and the Suffolk County District Attorneys, the New York State Department of Taxation & Finance, the Nassau and Suffolk County Police Departments, the United States Attorney for the Eastern District of New York, the Organized Crime Strike Force for that district, the Federal Bureau of Investigation, and the Internal Revenue Service. In addition, Suffolk County Assistant District Attorney Raymond Jermyn was "cross-designated" as Assistant United States Attorney for purposes of the investigation. Although the task force operation was initiated with the goal of obtaining evidence which would be employed in the prosecution of state grand larceny charges, the agents involved in the operation expected that the investigation would yield evidence pertinent to the prosecution of federal violations as well.

In 1986, defendants pleaded guilty to virtually all charges in a 1004-count state indictment which alleged, *inter alia,* New York State excise tax evasion. Federal investigators continued their inquiry, however, until January 1991, and

ultimately rendered an indictment. Defendants now move to dismiss the federal indictment, urging that such action violates the Double Jeopardy Clause of the Fifth Amendment.

DISCUSSION

Defendants assert that the federal indictment should be dismissed, as violative of the Double Jeopardy Clause of the Fifth Amendment, because they previously were prosecuted by New York State for the same conduct which, in part, underlies the present indictment, and further, because agents of the federal government were intimately involved in the state investigation and prosecution. They argue that the dual sovereignty doctrine, first enunciated by the Supreme Court in *United States v. Lanza,* 260 U.S. 377 (1922), is inapplicable to the present case because of the "inextricable" involvement of state and federal officials in the initial prosecution. In support of this argument, defendants rely on *Bartkus v. Illinois,* 359 U.S. 121, *reh'q denied,* 360 U.S. 907, where the Supreme Court held that a subsequent prosecution is barred where one sovereign is "acting as a `tool' of the other, or where one prosecution is merely `a sham and a cover' for another." *United States v. Davis,* 906 F.2d 829, 832 (2d Cir. 1990) (quoting *Bartkus,* 359 U.S. at 123-24). While acknowledging the accuracy of defendants' recitation of the exceptions to the dual sovereignty doctrine, this Court finds that the facts of the present case simply do not warrant their application.

The Fifth Amendment states, in relevant part, "Nor shall any person be subject *for the same offense* to be twice put in jeopardy for life or limb." U.S. CONST. amend. V (emphasis added). As the government observes, the

Constitution, by its very terms, "eloquently resolves" the issue raised in this case, because the defendants are, in fact, being pursued for separate and distinct violations. It has long been recognized that a federal prosecution, subsequent to a state proceeding prompted by the same conduct, is not precluded by the edicts of the Double Jeopardy Clause. *Abbate v. United States*, 359 U.S. 187 (1959); *United States v. Lanza*, 260 U.S. 377 (1922). This principle, commonly referred to as the dual sovereignty doctrine, was first enunciated in *Lanza*, where the Supreme Court explained that "the Fifth Amendment. . .applies only to proceedings by the federal government,. . .and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority." 260 U.S. at 382 (citation omitted). The primary rationale for thus restricting the ambit of the Double Jeopardy Clause is that, as every citizen of the United States is a citizen of a state or territory as well, such an individual may, by a single act, "commit[] two offences [sic], for each of which he is justly punishable." *Bartkus*, 359 U.S. at 132 (quoting *Moore v. Illinois*, 14 How. 13, 20 (1852) In discussing the scope and limits of the Double Jeopardy Clause, the Supreme Court has further reasoned that "if the states are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Abbate*, 359 U.S. at 195.

However, as both the Supreme Court and the Second Circuit have noted, the dual sovereignty doctrine is not wholly without exception. *Bartkus*, 359 U.S. at 123-24; *United States v. Russotti*, 717 F.2d 27, 31 (2d Cir. 1983), *cert. denied*, 465

U.S. 1022 (1984). In *Bartkus*, the Supreme Court carved out a narrow exception to the dual sovereignty rule, wherein a successive prosecution will be barred if it is demonstrated that one prosecuting sovereign is merely acting as a "tool" of another sovereign, or where the second proceeding is essentially a "sham and a cover" for the first. 359 U.S. at 123-24. Emphasizing the restraint with which this exception should be applied, the Second Circuit has recently declared that only an "extraordinary type of case" will fall within the narrow parameters of the *Bartkus* exception. *Davis*, 906 F.2d at 832.

Defendants fail to establish the existence of such extraordinary circumstances. It is well-settled in the Second Circuit that the mere showing of a joint investigation of criminal activity by two sovereigns is insufficient to invoke the *Bartkus* exception. *Davis*, 906 F.2d 829 (2d Cir. 1990); *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984); *Russotti*, 717 F.2d 27 (2d Cir. 1983). Defendants rely extensively on language in *Davis* which distinguishes between joint federal-state activity undertaken merely on the investigative level, and that which involves participation by prosecutors, "those with the authority to act in their sovereign's name." *Davis*, 906 F.2d at 834. Defendants assert that because there was joint activity on the prosecutorial level, and, in particular, because one agent was cross-designated as a representative of both state and federal interests, there was sufficient involvement to justify abrogation of the dual sovereignty doctrine.

However, defendants' interpretation of *Davis* swallows the *Bartkus* rule. Although clearly differentiating between

investigative and prosecutorial participation, *Davis* does not support the proposition that a significant degree of joint prosecutorial activity, absent some form of manipulation as indicated in *Bartkus*, is a sufficient basis for departing from the dual sovereignty doctrine. *Davis*, for instance, involved the question of the admissibility in federal proceedings of evidence which the County Court Judge had declared illegally obtained. *See* 906 F.2d 835.

As the government in the present case accurately asserts, the state has "no motive" for attempting to manipulate the initiation or outcome of a federal prosecution, since the state proceedings were resolved with a guilty plea. Defendants assert that the federal prosecution was commenced for the purpose of exacting a heavier sentence than was rendered by the state court, and thus, impliedly, that manipulation was in fact involved. However, the Second Circuit has held that "[e]ven if federal prosecutors had previously agreed that [a] state prosecution should proceed first on the expectation that substantial punishment would be imposed, the federal prosecutors would not thereby be 'manipulating' [the] state prosecution in any sense that might implicate double jeopardy or due process concerns." *Aboumoussallem*, 726 F.2d at 910 n.3 (citation omitted). Similarly, the initiation of proceedings by a sovereign, for the purpose of exacting a sentence which it lawfully seeks in response to a transgression of its laws, is not manipulative under *Bartkus* or under any other standard. Thus, even assuming, *arguendo*, the veracity of defendants' assertions, no basis exists for disregarding the dual sovereignty doctrine. In the absence of such a basis, defendants' reliance on *Grady v. Corbin*, 110 S.Ct. 2084 (1990), goes too far. *Grady*

announced the present standard for reviewing whether successive prosecutions by a single sovereign impermissibly involve the same conduct, so as to render the second invalid under the Double Jeopardy Clause. Since defendants have failed to establish a sufficient nexus between the state and federal prosecution to justify application of the *Bartkus* exception, the state and federal prosecutions may not properly be viewed as the activity of a sole sovereign, and consequently, the *Grady* test holds no relevance.

Finally, defendants' collateral estoppel arguments are misplaced. As the government concedes, a determination of collateral estoppel may indeed have double jeopardy consequences. *Ashe v. Swenson*, 397 U.S. 436 (1970). The present case, however, does not warrant application of collateral estoppel principles, as no issues were resolved against the government in the state prosecution.

APPENDIX C
[Memorandum Decision And Order of The District Court]

CONCLUSION

This Court therefore holds that the Double Jeopardy Clause does not bar prosecution under the present federal indictment. To hold otherwise would render the dual sovereignty rule a nullity. Accordingly, defendants' motion is denied.

SO ORDERED.

s/_____
LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Dated: Hauppauge, New York
June 24, 1991

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

No. 91-967

In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD TEICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

ROBERT E. LINDSAY
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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars this prosecution for willful evasion of the federal excise tax on gasoline and conspiracy to defraud the United States, because petitioner previously pleaded guilty in state court to violations of state law arising from the same activities that were the subjects of the joint federal and state investigation that led to this prosecution.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-967

GERALD TEICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The memorandum and order of the district court (Pet. App. 6a-14a) is reported at 766 F. Supp. 87.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1991. A petition for rehearing with suggestion for rehearing en banc was denied on December 2, 1991. Pet. App. 4a-5a. The petition for a writ of certiorari was filed on December 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 30, 1991, petitioner and four other individuals were charged in a federal indictment in the Eastern District of New York with one count of conspiracy to defraud the United States, and four counts of attempted evasion of approximately $14 million in federal gasoline excise taxes. C.A. App. 17-31.

The five individuals charged in the indictment owned or worked for various businesses that purchased and sold gasoline between January 1, 1984, and March 8, 1986. C.A. App. 17-18, 20, 24. During that period, federal law required a producer of gasoline to pay the United States a federal excise tax of nine cents on each gallon of gasoline sold. *Id.* at 18. The Internal Revenue Code defined "producer" to include, among others, certain wholesale distributors of gasoline, as well as producers of gasoline. *Ibid.* A producer, including a wholesale distributor, that held a Registration for Tax Free Transactions (IRS Form 637) could buy gasoline tax free, and make tax-free sales to another holder of a Form 637. *Id.* at 18-19. The first producer to sell gasoline to a buyer who did not hold an IRS Form 637 was required to pay the excise tax. *Id.* at 19.

Petitioner worked in the offices of No Brand Gasoline, Inc., a company that did not hold a Form 637. C.A. App. 18, 19. Lewis Petrochemical & Trading Corp., which did hold a Form 637, sold gasoline to No Brand, and was required to pay excise tax on those sales. *Id.* at 19-21. Ordinarily, Lewis Petrochemical would have included the tax in the price it charged No Brand for the gasoline. *Ibid.*

According to the indictment, however, petitioner and his co-defendants perpetrated a complicated scheme that created the illusion that gasoline sales from Lewis Petrochemical to No Brand were in fact made to so-called "burn companies" that held Form 637. The indictment charges that the burn companies in turn made tax-included "sales" to No Brand, and thus

incurred liability for the federal excise taxes. Because the burn companies were short-lived entities with little or no assets, however, the Internal Revenue Service was unable to collect the taxes from them. C.A. App. 19-23.[1]

The proceeds of the conspiracy were divided among the indicted parties and others, often in the form of cash or gasoline or both. C.A. App. 23. Those proceeds were considerable. The indictment charges that the petitioner and his co-defendants failed to pay more than $14 million in federal excise taxes that were lawfully due. *Id.* at 27-31.[2]

2. The indictment in this case was a result of a joint investigation by the United States and the State of New York. C.A. App. 69. During the investigation, Suffolk County Assistant District Attorney Raymond Jermyn was "cross-designated" for purposes of the investigation as a Special Assistant United States Attorney. Jermyn's cross-designation terminated on March 31, 1989—almost two years before the indictment against petitioner in this case was brought—and he had no involvement in drafting or bringing that indictment. *Id.* at 119-120. In 1986, as a result of the investigation, a New York State grand jury returned a 1,004-count indictment against petitioner and others. *Id.* at 33-35. The state indictment charged the defendants with stealing and conspiring to steal approximately $16,700,000 in state excise tax revenues

[1] The indictment alleges that the defendants and others conspired to conceal the existence of their scheme and to prevent the disclosure of their activities. The burn companies were each used for only a short period of time in order to minimize the chance that the scheme would be discovered, and records were destroyed in order to conceal the conspirators' activities. C.A. App. 23.

[2] The indictment also charges petitioner and his co-defendants with failing to file federal excise tax returns, falsifying books and records, concealing assets and sources of income, and making false statements to the IRS and a federal grand jury. C.A. App. 27-31.

and approximately $19,200,000 in state sales tax revenues. *Id.* at 41. In 1987, petitioner pleaded guilty to 1,003 counts of the state indictment. *Id.* at 61-65.

3. Following the return of the indictment in this case, petitioner and his co-defendants filed a motion to dismiss, contending that the federal prosecution violated the Double Jeopardy Clause. The district court denied that motion by Memorandum and Order dated June 24, 1991. Pet. App. 6a-14a. The court held that under the dual sovereignty doctrine—which permits a federal prosecution after a state proceeding arising out of the same conduct—the Double Jeopardy Clause does not bar this federal prosecution. The court rejected the defendants' contention that, because of cooperation and coordination between the state and federal authorities, this case fell within an exception to the dual sovereignty rule, under which a successive prosecution will be barred if it is demonstrated that one prosecuting sovereign is merely acting as a "tool" of the other or that one proceeding is essentially a sham and a cover for the other.

4. Following an interlocutory appeal, the court of appeals affirmed the district court's order. Pet. App. 1a-3a. Citing *Abbate* v. *United States*, 359 U.S. 187 (1959), the court noted that the Double Jeopardy Clause does not preclude successive state and federal prosecutions for the same acts. The court also rejected petitioner's contention that the prosecution in this case fell within an exception to the dual sovereignty principle. In particular, the court concurred in the findings of the trial court that neither sovereign was "acting as a 'tool' of the other," and that neither prosecution was merely a "sham and a cover" for the other. Pet. App. 2a.[3]

[3] On December 23, 1991, petitioner entered a conditional guilty plea on the conspiracy charge (Count 1) and on two counts of attempted tax evasion (Counts 4 and 5). The plea is conditioned on the disposition of this petition.

ARGUMENT

Petitioner contends (Pet. 13-26) that the decision of the court of appeals is inconsistent with *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), and that the courts of appeals have divergent views regarding the existence and scope of the "sham" exception to the dual sovereignty doctrine.

1. The court of appeals properly applied the dual sovereignty doctrine. Under that doctrine, the Double Jeopardy Clause does not prohibit one sovereign, such as the federal government, from prosecuting a defendant for particular conduct, even if that conduct has previously been the subject of prosecution by another sovereign, such as a State. *Abbate* v. *United States*, 359 U.S. 187, 194 (1959); *Bartkus* v. *Illinois*, 359 U.S. at 132; *United States* v. *Lanza*, 260 U.S. 377 (1922).

In *Bartkus*, the Court suggested that the dual sovereignty doctrine might not apply, and that a subsequent prosecution might be barred, if one prosecuting sovereign was acting as a "tool" of the other, or if one prosecution was merely a "sham and a cover" for another. *Bartkus*, 359 U.S. at 123-124. Finding that not to be the case on the facts before it, the *Bartkus* Court rejected the contention that the subsequent state prosecution of the defendant following his acquittal in a federal trial violated due process.

Petitioner contends (Pet. 15-26) that this case falls within the "sham" exception to the dual sovereignty doctrine suggested by this Court in *Bartkus*. Citing the cooperative efforts of state and federal authorities in the joint investigation and the cross-designation of state prosecutor Jermyn as a Special Assistant United States Attorney, petitioner asserts that the federal and state authorities were so "inextricably intertwined" (Pet. 9) in the investigation conducted by the joint task force that any prosecutions resulting from that investigation must be regarded as the work of a single sovereign. Focusing in particular on Jermyn's

participation in both the federal and state cases, petitioner asserts that the federal government was the "unique and ultimate source of power" behind the task force investigation. Pet. 21 n.8.

These contentions are without merit. As both the district court and the court of appeals concluded, there is nothing to suggest that either sovereign in this case was acting as a tool of the other, or that either prosecution was a sham and a cover for the other. Both the state and federal governments had distinct interests in prosecuting petitioner for his crimes—specifically, each sovereign was defrauded of millions of dollars in tax revenue. Under the facts here—where the damage to each sovereign's interests is readily identified and distinguished—it is clear that neither prosecution could vindicate the interests of the non-prosecuting sovereign. There is therefore nothing improper in the federal government's effort to punish petitioner for his federal crimes after the state government had completed its prosecution for state offenses. See *Heath* v. *Alabama*, 474 U.S. 82, 93 (1985) ("Federal Government has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the Federal Government."); *United States* v. *Davis*, 906 F.2d 829, 832 (2d Cir. 1990) ("nothing prevents a federal prosecution whenever the state proceeding has not adequately protected the federal interest"). The federal government's interests in imposing and collecting federal excise taxes on motor fuel transactions and in prosecuting violations of its tax laws could not possibly have been protected in the prior state prosecution of defendants for state tax violations. See *Heath* v. *Alabama*, 474 U.S. at 93. Thus, the federal government's interests were not represented in the state proceeding, and the federal government was entitled to

bring the instant prosecution in order to punish the violation of its own laws.[4]

Petitioner points to nothing suggesting that either sovereign involved in the joint investigation was attempting to vindicate the other's interests. The cross-designation of prosecutor Jermyn merely served to facilitate his participation and assistance in the joint investigation. There is no evidence that Jermyn, in his capacity as a state prosecutor, was controlled or influenced by federal authorities, or that he was acting to protect federal interests.[5] Moreover, Jermyn's designation as an attorney authorized to represent the United States terminated on March 31, 1989, and he was not involved in either drafting or reviewing the federal indictment in this case. C.A. App. 119-120.

2. Petitioner fails to identify a conflict between the decision in this case and that of any other court of appeals. Although petitioner contends (Pet. 14-15) that the Fifth and Seventh Circuits have questioned the existence of the *Bartkus* exception, and that the Tenth

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[4] The same is true with respect to the interests of the State of New York. There can be no suggestion that the State was not seeking to vindicate its own interests in prosecuting the theft of nearly $36 million in state excise and sales taxes.

[5] Petitioner points (Pet. 10-11, 23) to the fact that Jermyn signed a plea agreement (C.A. App. 82-85) between certain governmental entities and George Kryssing, a gasoline supplier implicated in a gasoline bootlegging scheme uncovered by the joint investigation. In the agreement, which was signed both by Jermyn and by a Department of Justice trial attorney (*id.* at 85), the term "the government" is used as an abbreviation for those agencies that agreed to be bound—the U.S. Department of Justice, Fraud Section, the Organized Crime Strike Force for the Eastern District of New York, the State of New York, and Suffolk County, New York. *Id.* at 82. While the agreement manifests cooperation among these entities, it does not indicate that they were functioning as a single government rather than as separate governmental entities independently looking after their own interests. It also does not suggest that the federal government was the ultimate source of power behind the state prosecution.

Circuit has recently characterized it as only a "possible" exception, he points to no case holding that the exception does not exist.[6] Moreover, even if the courts of appeals were in conflict on that issue, such a conflict would not require resolution in this case. The court of appeals assumed that the *Bartkus* exception exists, and correctly concluded on the facts of this case that the exception would not apply, because neither prosecution was a sham or a cover for the other.[7]

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[6] The cases that petitioner characterizes as questioning whether the exception exists merely recognized that this Court has never held it to be applicable in any case, and that *Bartkus* itself refused to invoke the exception on the facts presented there. See *United States* v. *Patterson*, 809 F.2d 244, 247 n.2 (5th Cir. 1987); *United States* v. *Paiz*, 905 F.2d 1014, 1024 n.13 (7th Cir. 1990), cert. denied, 111 S. Ct. 1319 (1991). The Tenth Circuit, in *United States* v. *Raymer*, 941 F.2d 1031 (1991), recognized that the *Bartkus* exception might bar a successive prosecution, and analyzed whether the degree of federal involvement in the prior state prosecution was so great that both prosecutions were effectively the act of one sovereign. No case cited by petitioner rejects the applicability of the *Bartkus* exception in appropriate factual circumstances.

[7] A district court case, *United States* v. *Belcher*, 762 F. Supp. 666 (W.D. Va. 1991), is the only instance cited by petitioner (Pet. 23-24) in which an exception to the dual sovereignty rule has been applied based on state/federal cooperation. In that case, as a result of destruction of evidence, a state prosecutor was unable to obtain convictions on drug offenses in a state prosecution. Thereafter, the same prosecutor, who was designated a Special Assistant United States Attorney, drafted an indictment against the same defendants for the same acts, and requested the United States Attorney to bring the charges in federal court. The court found that the prosecutor, in effect, moved the case to federal court in an effort to avoid the state evidentiary ruling concerning the destruction of evidence. As a result, the court viewed both sovereigns as in privity for collateral estoppel purposes, and held that the federal government could not relitigate the issues that the same prosecutor had lost in state court.

Unlike *Belcher*, this was not a case in which the state prosecutor sought to circumvent an unfavorable evidentiary ruling by seeking

Petitioner argues (Pet. 24-25) that the Ninth and Tenth Circuits are in conflict as to whether the cross-designation of state prosecutors as federal prosecutors implicates the *Bartkus* exception. In *United States* v. *Bernhardt*, 831 F.2d 181, 182-183 (1987), the Ninth Circuit expressed concern that a state prosecutor received a cross-designation as a federal prosecutor, and brought a federal prosecution arising out of the same facts as a prior state case that he had prosecuted. The Ninth Circuit nonetheless concluded that the cross-designation, even in combination with state funding of both cases, did not trigger the "sham" exception as long as there was sufficient independent federal involvement in the federal prosecution. *Id.* at 183.

The Tenth Circuit, in *United States* v. *Raymer*, 941 F.2d 1031, 1039 (1991), questioned whether involvement of the same witnesses and the same prosecutor in successive state and federal prosecutions could ever be enough, standing alone, to establish that the federal prosecution was a sham. The court nonetheless evaluated the degree of independent federal involvement in the case and concluded that the "sham" exception was inapplicable because the "federal prosecution was [not] merely a tool of the State." *Ibid.* Thus, although the Tenth Circuit has expressed skepticism about whether the "sham" exception might be triggered by the cross-designation of a state or federal prosecutor, there is no conflict in the holdings of the Ninth and Tenth Circuits on the issue presented in this case.[8]

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the federal indictment. Moreover, Jermyn, unlike the state prosecutor in *Belcher*, was not involved in the institution of the federal prosecution here. Finally, as the district court found (Pet. App. 12a), given the favorable resolution of the state case, the State of New York had no motive for attempting to manipulate or influence this federal prosecution.

[8] Petitioner also contends (Pet. 14) that the decision in this case has created "an intolerable intra-Circuit conflict" with *United*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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States v. *Davis*, 906 F.2d 829 (2d Cir. 1990). Even if such an intra-circuit conflict existed, it would not be for this Court to resolve. In any event, the conflict posited by petitioner does not exist. Contrary to petitioner's assertion, the Second Circuit did not hold in *Davis* that the analysis under *Bartkus* should focus primarily on the extent to which federal prosecutors had actively participated in a prior state prosecution. Rather, the *Davis* court recognized that the question under *Bartkus* is whether "one prosecuting sovereign can be said to be acting as a 'tool' of the other" or whether "one prosecution is merely 'a sham and a cover' for another." 906 F.2d at 832, 834. The analysis in *Davis* to which petitioner refers concerned whether the Due Process Clause, as distinct from the Double Jeopardy Clause, required application of collateral estoppel in that federal prosecution. *Id.* at 832-835.